Supreme Court, U.S.
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No. 99-439

IN THE
SUPREME COURT OF THE UNITED STATES

NATURE'S DAIRY, et al.,
Petitioners,

v.

DAN GLICKMAN, AS SECRETARY OF AGRICULTURE, UNITED STATES DEPARTMENT OF AGRICULTURE, AND NATIONAL DAIRY PROMOTION BOARD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT

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QUESTION PRESENTED FOR REVIEW

Whether under the First Amendment business entities can be compelled to fund generic advertising and nutrition education when such compulsion is outside of any broader collective enterprise and the compelled speech component is not part of a regulatory scheme that otherwise constrains their freedom to act independently?

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REPLY ARGUMENT

1. The Sixth Circuit has just held that one commodity promotion program violates the First Amendment. In *United Foods, Inc. v. United States, et al.*, No.98-6436, 1999 Fed App. 0391P (6th Cir., Nov. 23, 1999), App. 73a, that circuit had before it a challenge to the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U. S. C. § 6101 *et seq*. In an opinion by Circuit Judge Merritt, it held that First Amendment analysis is appropriate in compelled funding of promotion. "Our interpretation of *Wileman* is that if either of the two elements is missing — either the collectivization of the industry or the purely commercial nature of the advertising — the First Amendment invalidates the compelled commercial speech." *Id.* at p. 7, App. 80a. The mushroom case creates the following dichotomy: producers who provide the milk for the cheese on a pizza are not entitled to the same First Amendment protection as those who supply the mushrooms.

The Respondents' brief, in contrast with the *United Foods* decision, raises the issue: when is regulation "extensive" enough that its participants forego their rights under the First Amendment? The question presented in this petition focuses on that issue. The dairy industry, though regulated, does not enjoy the uniformity or universality of regulation found in the summer fruit orders at issue in *Wileman Brothers*. Some producers, including some Petitioners, have chosen not to participate in the dairy industry regulation or enjoy regulated minimum prices.

Contrary to the Respondents' argument, the answer to the issue is found not in the extensiveness of the regulation, but the collectivism. Simply stated, a collective as an entity has its own right to a voice. Granting collectives such as the fruit

marketing committee the ability to collect fees to speak on behalf of the collective is not the result of regulation, but the existence of the collective itself. The failure of a named industry, such as dairy producers, to fully collectivize into an entity either voluntarily or by operation of law or rule, means that there are no members who must trade First Amendment protection in exchange for membership in the collective with its benefits. To the extent, and only to the extent, there is a collective for purposes other than speech, then speech germane to the collective is appropriate.

The Respondents' argument fails to explain at what degree the government involvement results in reduced freedom. Respondents at pp. 8-9. The transportation industry receives subsidization in the form of highways and traffic enforcement paid by the public. How, in deciding First Amendment issues, does that differ from dairy price supports? Do minimum wage laws and a public policy favoring labor unions and collective bargaining mean that workers, union or not, must participate in speech? Import duties and regulations are used to protect a myriad of industries, not just dairy. Do clothing and shoe manufacturers give up First Amendment rights in exchange for import quotas on clothing? A multitude of statutes promote the development of trade and commerce, not just the "federal cooperative policy" noted by the Respondent.

Alcohol and liquor, too, are heavily regulated industries having even their own provisions in a Constitutional Amendment. Nonetheless compelled speech of this regulated industry was held unlawful by this Court. *Rubin v. Coors Brewing Company,* 514 U.S. 476 (1995). Non profit organizations that enjoy favorable tax treatment, too, have not been compelled to speak. *Riley v. National Federation of Blind of N.C., Inc.*,487 U.S. 781 (1988).

The "extent of regulation" argument raises more questions than it answers. That is why the instant Question should be accepted and addressed. As an industry that is not fully collectivized as the California fruit industry yet enjoys more protection than the mushroom industry, the dairy industry generally, and the Dairy Promotion Program specifically, provide the opportunity to bring needed answers to this area of the law.

As *United Foods* shows, this Court's decision in *Glickman v. Wileman Bros. & Elliott,* 521 U.S. 457 (1997) is not dispositive of the instant petition as argued by Respondents. In *Wileman Brothers*, this Court considered the challenged advertising "as part of a broader collective enterprise" *Id.* at 458. Contrary to the Respondents' characterization of *Wileman Brothers,* the decision did not look at generic advertising but "marketing orders", or the collective activity, which included the challenged generic advertising. *Id.* at 469.

2. This Court has not expressly addressed the issue of whether compelled speech outside of a collective violates the First Amendment. *Wileman Brothers* suggested that membership in the collective group was significant. "[O]ur cases provide affirmative support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of ***some members of the group***." 521 U.S. at 472-473. [Emphasis added].

Nor has this Court implicitly agreed there need be no collective body. Respondent suggests that the Court has indirectly done so. Respondents' Brief at pp. 9-10. Though this Court granted certiorari in *Wileman Brothers* based upon a conflict with the Third Circuit's decision in *United States v. Frame,* 885 F.2d 1119 (1989), *See* 521 U.S. at 466-67, this

Court did not expressly adopt the *Frame* analysis or holding besides briefly summarizing it. That this Court considered *Frame* for purposes of conflict is not a statement that this Court approves of the holding. It is, at most, the equivalent of a summary affirmance of *Frame*. "As we stated ...the precedential effect of a summary affirmance can extend no farther than 'the precise issues presented and necessarily decided by those actions.' A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment. Questions which 'merely lurk in the record,' are not resolved, and no resolution of them may be inferred. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979), *citations omitted.*

Nor can the Respondents' conclude that this Court has settled the issues by its denial of certiorari. Denial of a writ of certiorari in other cases is not an expression of this Court's view on the merits of those cases. This Court has repeatedly reminded the bar that denial of a writ of certiorari "imputes no expression upon the merits of the case, as the bar has been told many times." *United States v. Carver,* 260 U.S. 482, 490 (1923). "[T]he Court has definitely decided that a denial of a petition for certiorari carries no legal significance." *Elgin, Joliet, and Eastern Railway Company v. Gibson,* 355 U.S. 897 (1957) (Frankfurter, J., *concurring).* Thus, this Court's denial of the writ in the cases of *Goetz v. Glickman,* 119 S. Ct. 867 (1999) and *Cal-Almond, Inc. v. Department of Agriculture,* 119 S. Ct. 57 (1998) means only that those petitions were denied and nothing more. *See, also,* ROBERT STERN, ET AL, SUPREME COURT PRACTICE, §5.7 (7th Edition).

3. The Respondents did not counter Petitioners' arguments that the speech was ideological in that it used the Petitioners' payments with others to, in part, promote approval of the

promotion program, and, thus, influence a federally sanctioned ballot on that issue. Petition at 13.

CONCLUSION

The petition for writ of certiorari raises a question deserving of consideration by this Court and should be granted.

Dated: November 24, 1999

Respectfully submitted,

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APPENDIX H

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION:
1999 FED App. 0391P (6th Cir.)
File Name: 99a0391p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED FOODS, INC., No. 98-6436
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA;
UNITED STATES
DEPARTMENT OF
AGRICULTURE,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Tennessee at Jackson.
Nos. 96-01252; 98-01082—
James D. Todd, District Judge.

Argued: September 23, 1999
Decided and Filed: November 23, 1999

Before: MERRITT and CLAY, Circuit Judges; ALDRICH,* District Judge.

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* The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

COUNSEL

ARGUED: Bradley A. MacLean, FARRIS, WARFIELD & KANADAY, Nashville, Tennessee, for Appellant. August E. Flentje, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington, D.C., for Appellees. **ON BRIEF:** Bradley A. MacLean, Tara L. Swafford, FARRIS, WARFIELD & KANADAY, Nashville, Tennessee, for Appellant. August E. Flentje, Barbara C. Biddle, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington, D. C., for Appellees.

OPINION

MERRITT, Circuit Judge. In this case of compelled, commercial speech challenged under the First Amendment, the Department of Agriculture requires the plaintiff, a mushroom producer, to contribute funds for advertising mushrooms, on a regional basis, as authorized by the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U. S. C. § 6101 *et seq* . [1]The District Court upheld the Act and

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[1] Enacted by Congress in 1990, the Mushroom Act states:

> It is declared to be the policy of congress that it is in the public interest to authorize the establishment

of an orderly procedure for financing through adequate assessments on mushrooms produced domestically or imported into the United States, program of promotion, search, and consumer and industry information designed to -

(1) strengthen the mushroom industry's position in the marketplace;

(2) maintain and expand existing markets and uses for mushrooms; and

(3) develop new markets and uses for mushrooms.

7 U. S. C. § 6101(b). These policy objectives are supported by findings set forth in the Act that mushrooms are not only an important food valuable to the human diet, but that they play a significant role in this country's economy and that their production benefits the environment. The Act does not permit the regulation of prices or mandatory quantity or quality controls of mushrooms produced and sold by farmers, nor does it subsidize or restrict the growth of mushrooms or otherwise collectivize the industry. It is basically a commercial advertising statute designed to assess mushroom growers for the cost of advertising. 7 C. F. R. Part 1209.40(a).

Pursuant to the Mushroom Act, the Secretary of Agriculture promulgated an Order establishing a Mushroom Council made up of mushroom producers nominated by producers and importers for appointment by the Secretary. 7 U. S. C. § 6104(b); 7 C. F. R. Part 1209. The Order generally directs the Council to "carry out programs, plans, and projects designed to provide maximum benefits to the mushroom industry." 7 C. F. R. § 1209.39(l). The Council's activities are funded through mandatory assessments on larger producers and importers of fresh mushroom products for domestic use, based upon poundage of mushrooms

the government's action compelling payments for mushroom advertising. The plaintiff claims that other mushroom producers shape the content of the advertising to its disadvantage and that the administrative process allows a majority of producers to create advertising to its detriment. The issue before us is whether the answer to the First Amendment question presented here should be the same as in the recent case of *Glickman v. Wileman Bros. & Elliott , Inc.* , 521 U. S. 457 (1997), in which the Supreme Court in a controversial 5- 4 decision[2] upheld a similar agricultural advertising program in the heavily regulated California tree fruits business (peaches, plums and nectarines). But unlike the tree fruit business in *Wileman*, the mushroom growing business in the case before us is unregulated, except for the enforcement of a regional mushroom advertising program.

The government argues that the degree of regulation or "collectivization" of an industry should make no First Amendment difference on the compelled advertising issue so long as the compelled advertising is nonpolitical and so long as the plaintiff is not restricted in its own advertising. The plaintiff contends to the contrary that the constitutionality of the compelled speech under the 1990 Mushroom Act — in light of *Wileman* — must turn on the degree of regulation of

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marketed in the United States and not to exceed a penny per pound. 7 U. S. C. § 6104(g), 7 C. F. R. § 1209.51. The Council has used these funds solely to finance generic advertising efforts on behalf of the mushroom industry.

[2] See, e. g., Nicole B. Casarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment* , 63 MO. L. REV. 929 (1998); Leading Case, *Commercial Speech —Compelled Advertising*, 111 H ARV . L. R EV . 319 (1997).

the industry. The question for us is whether the degree of government regulation of an industry controls the outcome or whether the government is right that this is irrelevant under *Wileman* .

In prior restraint and compelled speech cases involving nonbroadcast political speech, the First Amendment prohibition is nearly absolute, *Near v. Minnesota* , 283 U.S. 697 (1931), holding that newspapers have a right to publish without prior restraint, *West Virginia v. Barnett* , 319 U. S. 624 (1943), holding that schoolchildren may not be compelled to join in a flag salute ceremony, and *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), holding that newspapers may not be compelled to publish a reply by political candidates. But commercial speech compelled by government is governed by a different, and as yet unsettled, set of principles which require a court to balance a number of factors according to its judgment concerning the welfare of buyers and sellers in the market place.

In the *Wileman* case, the Supreme Court emphasized and reemphasized that the compelled advertising program for California tree fruits under the Agricultural Marketing Agreement Act of 1937 contemplates "a uniform price to all producers in a particular market," a "policy of collective, rather than competitive, marketing" and an exemption from the antitrust laws in order "to avoid unreasonable fluctuation in supplies and prices." *Wileman* , 521 U. S. at 461. In his opinion for five members of the Court, Justice Stevens repeatedly "stress[ed] the importance" of the fact that the advertising takes place "as a part of a broader collective enterprise in which [the producers'] freedom to act independently is already constrained by the regulatory scheme." *Id.* at 469. In contrast, the mushroom market has not been collectivized, exempted from antitrust laws,

subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply. Except for the compelled advertising program assessing growers based on their volume of mushroom production, there appears to be a relatively free market in mushrooms, both processed and fresh.[3]

On the other side of the ledger, the government correctly argues that Justice Stevens also emphasized repeatedly in his opinion that the compelled agricultural

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[3] Justice Souter's twenty- five page dissenting opinion in *Wileman* provides an extensive history of compelled advertising in the market for agricultural commodities. His reading of the history of the agricultural regulations is that it shows that the advertising is simply the result of interest group lobbying, not a response to economic conditions. *See Wileman* , 521 U.S. at 491- 99 (Souter, J., dissenting). Justice Souter's dissent recounts that in 1952 Congress began providing for compelled advertising for an ever-expanding list of agricultural commodities. Sometimes the legislation, and the marketing orders authorized by the legislation, cover a commodity from just one section of the country — for example, California peaches but not Georgia peaches. In recent years Congress has added many farm products to the list in which compelled advertising is the main or the only form of regulation. Justice Souter explains that this comes about because of "the view of the Department of Agriculture that 'any fruit or vegetable commodity group which actively supports the development of a promotion program by this means should be given an opportunity to do so. '" *Id.* at 495- 96 (citing S. R EP . N O . 92-295, at 2 (1971)). Justice Souter concludes that these programs of compelled advertising appear to rest only on "the preference of a local interest group." *Id.* at 497. "Without more, the most reasonable inference is not of a substantial Government interest, but effective politics on the part of producers who see the chance to spread their advertising costs." *Id.* at 498.

advertising in *Wileman* is not a *restriction* on commercial advertising as in cases that have invalidated such regulation, *see, e. g.* , *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980), because separate, individual, producer advertising of tree fruits is not prohibited or restricted. *See Wileman*, 521 U. S. at 469- 70. The opinion emphasizes that the test for compelled advertising is not the same as the four-part test for restrictions on advertising set out in *Central Hudson* . *See id.* The government also correctly argues that Justice Stevens repeatedly emphasizes that no "symbolic," "ideological" or "political" speech is involved in the tree fruit advertising. *See id.* Justice Stevens' opinion sets out these various factors concisely when he says that the compelled advertising of tree fruits passes muster "because (1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders [which collectivize the industry] and, (2) *in any event*, the assessments are not used to fund ideological activities." *Wileman* , 521 U. S. at 473 (emphasis added).

The question for us then is whether these two elements — (1) germaneness to a valid, comprehensive, regulatory scheme and (2) nonideological content — are independent of each other and each provide a sufficient basis for upholding compelled commercial speech. In other words, even though the mushroom advertising program before us is not "germane" to any collective program setting prices or supply, does the fact that the advertising is "nonideological" or "nonpolitical" in nature mean that it should be permitted under the First Amendment?

We do not read the majority opinion in *Wileman* as saying that any compelled commercial speech that is nonpolitical or nonsymbolic or nonideological does not warrant First Amendment protection. We conclude that the

explanation for the *Wileman* decision is to be found in the fact that the California tree fruit industry is fully collectivized and is no longer a part of a free market, as well as in the nonpolitical nature of the compelled speech. The majority uses this concept of collectivization and the nonideological nature of the advertising together. The conjunction "and" — germaneness "and" nonpolitical — is used in the Court's holding. Our interpretation of *Wileman* is that if either of the two elements is missing — either the collectivization of the industry or the purely commercial nature of the advertising — the First Amendment invalidates the compelled commercial speech, absent some other compelling justification not present in the case before us. The Court's holding in *Wileman* , we believe, is that nonideological, compelled, commercial speech is justified in the context of the extensive regulation of an industry but not otherwise. The purpose of this principle joining regulation and content is to deter free riders who take advantage of their monopoly power resulting from regulation of price and supply without paying for whatever commercial benefits such free riders receive at the hands of the government. Whether wise or unwise, or true or untrue, the legislative theory behind such extensive regulation is that the interests of producers and consumers are furthered by the monopoly powers inherent in government control of price and supply. In exchange for such power in the market place, members of the industry may have to provide certain benefits to their industry in the form of payments for nonideological advertising of industry products. If an economic actor chooses to remain aloof from the regulated industry, he owes no reciprocal duty to promote the industry; but if he chooses to join, he has a reciprocal duty to promote its interest. This principle of reciprocity designed to control free- ridership is essentially the same basis upon which the Supreme Court upheld some, and struck down other, compelled speech in the union, closed- shop context in *Lehnert v. Ferris Faculty Ass'n*

, 500 U. S. 507 (1991).

Applying this interpretation to the case at hand, we find that the context of the mushroom business is entirely different from the collectivized California tree fruit business. Mushrooms are unregulated. Hence the compelled commercial speech is not a price the members must pay under the reciprocity principle in order to further their self-interest which is regarded as arising from heavy regulation through marketing orders controlling price, supply and quality. Thus in the absence of extensive regulation, the effort by the Department of Agriculture to force payments from plaintiff for advertising is invalid under the First Amendment. The portions of the Mushroom Act of 1990 which authorize such coerced payments for advertising are likewise unconstitutional.

Accordingly, the judgment of the District Court is reversed.